No. 2783.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Louisa Pickens and Johanna Schutt,

Appellants.

vs.

J. H. Merriam, Eugene Wellke, Alma J. Schmidt, Amanda Katzung, Minnie S. Farnsworth, Corrine Loveland and Don Ferguson,

Appellees.

PETITION FOR REHEARING.

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Duty to our clients requires us to point out (with respect and deference but with candor) that in the learned opinion announced in the case at bar, the court has inadvertently fallen into grave error. This, we respectfully urge, results primarily from the omission to notice three propositions of law advanced in appellees' brief, the application of any one of which to the

facts would have constrained to the affirmance of the decree. These propositionus are:

First: Plaintiffs who charge fraud after the running of the statutory period must, in their complaint, affirmatively show diligence on their part, and this is true whether or not the fraud has been concealed; and their duty in this regard is not discharged by an allegation of ignorance at one time and knowledge at another, but they must fully disclose the facts showing when discovery was made, how it was made, what the discovery was, and why it was not sooner made. (Wood v. Carpenter, 101 U. S. 135; Hardt v. Heidweyer, 152 U. S. 547; Kelley v. Boettcher, 85 Fed. 55, 62.)

The failure of the court to apply these principles arises from the misapprehension that the decision of the Kansas court is "persuasive" here, when in truth and in fact the rules of pleading in Kansas are diametrically opposed to the rules in the federal courts and in California. (See *infra.*)

The reasons for the practice in the federal courts, which follows immemorial usage in courts of equity, are obvious, and are succinctly stated in Foster v. Mansfield, Cold Water & Lake Michigan Railroad Co., 146 U. S. 88, where it is said:

> "The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that

he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

146 U. S. 99.

Secondly: Where there has been a lapse of time several times the duration of the statutory period, together with the death of a party or an important witness, laches is shown. (Foster v. Mansfield etc. Co., 146 U. S. 88, at p. 100; Hinchman v. Kelley, 54 Fed. 63, at p. 66 (C. C. A., 9th Cir.); Socrates etc. Mines v. Carr Realty Co., 130 Fed. 293, at 297 (C. C. A., 9th Cir.)).

Thirdly: Not only the matter actually tried in a proceeding, but also matter "so in issue that it might have been tried" is intrinsic to a judgment. (U. S. v. Throckmorton, 98 U. S. 61, citing with approval Greene v. Greene, 2 Gray, 361.)

It will conduce to a better understanding of these points here to suggest some phases of the facts alleged in the complaint which are, it seems to us, important, but which apparently have not so impressed the learned writer of the opinion.

First, let it be noted that the court is in error in saying plaintiffs are seeking an accounting from defendant Merriam, administrator of the estate of Jeanette Fensky, "for so much of the estate as has come into his hands *and for which no account has been rendered.*" (Opinion, page 17.) To the contrary, the prayer is only that he be required to account to the complainants for the distributive shares of the estate of

the said Jeanette Fensky, which *came into his hands* and which *was by him distributed* to the said Wellke, Katzung and Schmidt. [Transcript p. 29.]

It is truly said in the opinion that the cause of action in the Kansas case is identical (in most respects) with the cause of action in this case, "except that the former relates to the estate in Kansas and the latter to the estate in California." The alleged fraudulent acts of Jeanette Fensky and Campbell, the Kansas administrator of the Ferdinand Fensky estate, necessarily constituted a part of plaintiffs' statement of their cause of action so far as it relates to the cancelling of their deeds to Jeanette Fensky, but this suit relates solely to the California property, the property which came to the hands of defendant Merriam as administrator of the estate of Jeanette Fensky and was distributed in the probate proceedings in that estate, and the California real property described in several deeds made by Jeanette Fensky to defendants Alma J. Schmidt, Eugene Wellke, Amanda Katzung and Corrine Loveland, which deeds, it is charged, were not delivered during the lifetime of Jeanette Fensky. It is directly alleged, however, that the deeds were signed and acknowledged by Jeanette Fensky several months before her death and *"were recorded a few days after her death."* [Trans. p. 27.] As Jeanette Fensky died July 8, 1908 [*Id.* p. 21], these conveyances were matters of public record for nearly six years prior to the commencement of this suit.

While it is stated that plaintiffs did not, until the early part of 1913, have any notice or knowledge that

the deeds were not delivered during the lifetime of Jeanette Fensky, there is no allegation as to when, or how, or from whom, the complainants then obtained such information; nor as to what they did learn with respect to the non-delivery of the deeds, other than the bald allegation that neither of the plaintiffs had notice or knowledge thereof until the early part of 1913. And it will be noted that this discovery, if it may be so termed, was made more than a year before the complaint was filed; also that the information obtained from the correspondence between Campbell and Jeanette Fensky was acquired late in the summer of 1912; and, further, that it was not acquired by the exercise of diligence by the plaintiffs, but that one of the daughters of plaintiff Pickens *accidentally* secured access to the correspondence between Campbell and Jeanette Fensky, which disclosed to said daughter "a part of the truth" (what part or how much is not stated) relative to the estate of Ferdinand Fensky and the dealings of Campbell and Jeanette Fensky in reference thereto. [Trans. p. 27.] Further, it appears that the discovery made from the correspondence between Campbell and Jeanette Fensky had nothing to do with the California property, which consisted of the property described in the aforesaid deeds signed and acknowledged by Jeanette Fensky and recorded "a few days after her death," and the money and notes distributed to certain of the defendants.

There is not a syllable in the complaint tending to show that complainants were not thoroughly familiar with the business affairs of Ferdinand Fensky during his lifetime and up to the time of his death. There is

an utter absence of averment to the effect that either Mrs. Fensky or Campbell resorted to any trick or artifice to prevent complainants from interviewing the debtors of the estate or the contractual vendees of the real estate. Indeed, as iterated and reiterated in appellees' brief, there is absolutely nothing in the complaint remotely to suggest the slightest exercise of diligence on the part of the complainants during the eleven years that elapsed since the time of the alleged frauds.

The death of parties or of important witnesses is universally recognized as an important factor in determining whether a cause of action is barred by laches. Here it is shown by the allegations of the complaint that Jeanette Fensky has been dead many years, and her estate administered and distributed. And it affirmatively appears from the report of Pickens v. Campbell, 159 Pac. 21, cited by this court in its opinion, that prior to the date of that decision Campbell had died and the action had been revived in the name of his administrator. (159 Pac. 22.) So the lips of both actors in the alleged fraud have long been closed by death.

I.

Failure of the court to take into account the difference between the principles of equity pleading in the federal courts and the rules of pleading in the Kansas courts has led it into the error of declaring that the decision of the Kansas court in the suit brought by the present plaintiffs is "persuasive as to the rules applicable to the same questions as they relate to the estate in California." (Opinion, pp.

11-12.) This gives an effect to the Kansas decision not claimed by its authors, and is admittedly at variance with the rule of pleading generally recognized and uniformly prevailing in the federal courts. In the Kansas case the court said:

> "The contention is made that the petition is demurrable because it merely alleges that the plaintiffs did not know of the facts pleaded until July, 1912, and does not state how the discovery came about. *The general rule appears to be that such a statement is required.* 25 Cyc. 1418; Hardt v. Heidweyer, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548. *But the contrary practice obtains in some of the states, including Kansas.* K. P. Rly. Co. v. McCormick, 20 Kan. 107; 25 Cyc. 1419." (159 Pac. 24.)

This point is made in appellees' brief (p. 29), but is not referred to in the opinion. It should be borne in mind, and has doubtless escaped the attention of the court, that the rule in the courts of California in this regard is the same as in the courts of the United States. In Phelps v. Grady, 168 Cal. 73 (relied upon in appellees' brief), speaking to this very question, and on facts much like those alleged in the complaint here, after observing that the complaint in intervention there sufficiently charged acts of deceit, the court said:

> "But in this case the conveyance was executed in 1904. The decree of final distribution in the estate of Timothy Guy Phelps was given in 1907. This action was commenced in 1912, and here for the first time interveners are found asserting the right to avoid their conveyance because of its

fraudulent procurement. Excepting upon a proper showing touching their discovery of the fraud their cause of action was barred. One seeking relief under such circumstances is held to stringent rules of pleading. Says the supreme court of the United States in Wood v. Carpenter, 101 U. S. 135:

"'In this class of cases the plaintiff is held to stringent rules of pleading and evidence. Especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether by reasonable diligence the discovery might not have been before made. * * * If the plaintiff made any particular discovery it should be stated when it was made, what it was, how it was made and why it was not made sooner.

* * * * * * * *

"'Concealment which will avoid the statute must go beyond mere silence. It must be something done to prevent discovery. * * * Concealment must be the result of positive acts. Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.'

"And this is the rule consistently adopted and adhered to in this state." (Citing four California cases.) (168 Cal. 77-78.)

Another evidence of the omission of this court to apply the principle that plaintiffs must affirmatively show diligence, by the averment of facts and circum-

stances, is found in the fact that the opinion assumes that Wood v. Carpenter, 101 U. S. 131, relied upon by respondents, is inconsistent with Bailey v. Glover, 21 Wall. 342, and is in effect overruled by Rosenthal v. Walker, 111 U. S. 185, and Traer v. Clews, 115 U. S. 528,—the last two cases following Bailey v. Glover. But in truth there is no inconsistency between the Wood case and the Bailey case, and the former case is expressly approved after the fullest consideration in the subsequent case of Hardt v. Heidweyer, 152 U. S. 547, relied upon in appellees' brief, but not noticed in the opinion of this court. Moreover, the doctrine of the Wood case and of the case last cited has been uniformly accepted as an authoritative statement of the law by the federal courts. (Hubbard v. Manhattan etc. Co., 87 Fed. 51, C. C. A., 2nd Cir.; Thornton *et ux.* v. Mayor etc., 129 Fed. 84, C. C. A., 5th Cir.; Kelly v. Boettcher, 85 Fed. 55, 62 C. C. A. 8th Cir.)

Let it be observed that in Bailey v. Glover,—the chief cornerstone of the opinion here,—the court in clear and explicit language recognizes the principles we invoke. Following the portion of the opinion quoted by this court, Mr. Justice Miller said:

> "We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it *without any fault or want of diligence or care on his part,* the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." (21 Wall. 348.)

Wood v. Carpenter but holds in accordance with the immemorial usage in courts of equity that such diligence must affirmatively appear from plaintiff's complaint.

It would appear that some confusion has been caused by Rosenthal v. Walker, *supra,* and Traer v. Clews, *supra,* but that confusion was dissipated in the able opinion of Mr. Justice Brewer in the subsequent case of Hardt v. Heidweyer, *supra.* And in neither of the earlier cases was the question now under discussion involved or considered. All of these cases were bankruptcy cases, and in each of them the proceeding was to reach property alleged to have been fraudulently concealed by the bankrupt.

In Rosenthal v. Walker the question considered by the court was whether concealed fraud would toll the statute. The court did not deal with the question of diligence nor with the manner of pleading discovery. Without any detailed examination of Wood v. Carpenter, the court said that case did not overrule or modify Bailey v. Glover, and also referred to the fact that it was an action at law without noticing that the legal rule has been borrowed from equity jurisprudence. (See 111 U. S., pp. 190-191.) Moreover, the case stood before the court after verdict. The same is true of Traer v. Clews. In this case also the sufficiency of the allegations in the complaint were not before the court and the court did not consider the doctrine of Wood v. Carpenter with reference to that point. Indeed, in that case, as in Bailey v. Glover, the allegations in the bill do not appear from the report.

But in Hardt v. Heidweyer, 152 U. S. 547, this precise question was considered. The circuit court had sustained a demurrer to the bill and dismissed the same. The appeal was from this decree of dismissal. The court, after an elaborate review of the authorities, approved Wood v. Carpenter, and quoted the following from the latter case:

> " 'A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner.' " (152 U. S. 559-60.)

The court also quoted with approval the following from an opinion by Mr. Justice Story in a case on the circuit:

> " 'General allegations, that there has been fraud, or mistake, or concealment, or misrepresentations, are too loose for purposes of this sort. The charges must be reasonable, definite, and certain as to time, and occasion, and subject-matter. And especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, *and what the discovery is;* so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made. For if, by such diligence, the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches. * * * But the bill does not state *what particular discoveries* have been obtained, or when they were obtained, or

by what inquiries, or in what manner, or at what time.'" (152 U. S. 559.)

In the Hardt case the court did not cite the earlier cases of Bailey v. Glover, Rosenthal v. Walker and Traer v. Clews, although the authorities were reviewed at length. Apparently the court did not feel called upon to cite those cases for the obvious reason that they were not in point. In the instant opinion, commenting upon Traer v. Clews, *supra,* this court says:

> "It was objected that there was neither pleading nor proof to avoid the bar under the rule stated in Wood v. Carpenter. The court held that under the ruling in Bailey v. Glover, which had never been overruled, doubted or modified by the court, the pleadings and evidence were sufficient, and the suit was not barred by the statute of limitations." (Opinion, p. 15.)

It is respectfully submitted that this language is inconsistent with Hardt v. Heidweyer, and it is believed that a consideration of that case will convince the court that it has fallen into error.

The omission of the court to apply the rule requiring the plaintiff affirmatively to show what diligence he has exercised is shown yet again by the fact that the court quotes from 19 Am. & Eng. Ency. 243, to the effect that the statute is tolled by such fraudulent concealment as prevents plaintiff from instituting suit. Assuming that the fraud here alleged comes within that rule, the following, quoted from the article referred to, shows that the matter quoted by the court is inapplicable here:

"This exception to the ordinary operation of the statute of limitations is *subject to the qualification that the party complaining must have used due diligence in endeavoring to discover the fraud or concealment practiced upon him and the facts which the defendant's fraud concealed.*" (19 Am. & Eng. Ency. of Law, p. 250.)

The same qualification is contained in the article in Cyclopedia of Law and Procedure cited by the court. See 25 Cyc., p. 1216.

As to any title acquired either as grantees of Jeanette Fensky or as distributees of her estate, appellees were involuntary trustees of a trust cast upon them by operation of law; no fiduciary relation was created or subsisted between them and appellants, and the statute of limitations for the enforcement of such implied trusts commenced to run upon the acceptance of their conveyances and the entry of the decree of distribution; and it was not necessary, in order to set the statute in motion, that appellees should have attacked or repudiated such trust.

Nougues v. Newlands, 118 Cal. 102.

In Robertson v. Burrell, 110 Cal. 568, the court, speaking to this question of pleading, said:

"Moreover, after the lapse of so much time, and *after the death of all the original parties, equity, for the peace of society, scrutinizes with great particularity bills such as this, and is not satisfied to retain one unless the fullest possible credible showing is made by the applicants for relief.* (Citing, among other cases, Wood v. Car-

penter, 101 U. S. 135, 143.) * * * The facts and circumstances must themselves be pleaded in order that the court may determine whether the sources of knowledge at last availed of were not at all times open to plaintiffs, whether they were negligently overlooked, whether other circumstances should not earlier have put plaintiffs upon discovery, what was the nature of the concealment practiced, whether it consisted in mere silence, or was accompanied by active misrepresentation and fraudulent deception."

110 Cal. 577-578.

After observing that in the instant bill there was not an entire absence of averment in these respects, but that it was a "fleshless skeleton of allegation," the court proceeded to say:

"*What the statements were;* how long before his death they were made; *whether or not due diligence after their making would not have resulted in discovery during Burrell's lifetime;* * * * what were the inquiries which the heir made and which resulted in discovery; of whom were they made, and why were they not made years before, are all questions which, upon the demand of the demurrer, should be answered by the bill in order that the chancellor, to whose conscience, in the first instance, the equity of the bill is addressed, should satisfy himself that plaintiffs have not neglected or slept upon their rights. (Hardt v. Heidweyer, 152 U. S. 547.)"

110 Cal. 578.

So, it would seem to be beyond question that the bill here is fatally defective, and that the district court

was right in dismissing the bill on the grounds that it was barred by *laches* and the statutes of limitation.

II.

The opinion makes bare mention of the fact that appellees contended in their brief that under the circumstances of this case prejudice to them should be presumed from the lapse of time together with the death of an important witness. (Opinion, page 17.) It is alleged in the bill that Jeanette Fensky died July 8, 1908, six years before the filing of the bill, and about five years after the perpetration of the alleged fraud by her and Campbell, and it appears from the report of Pickens v. Campbell, 159 Pac. 21, as already pointed out above, that Campbell is also deceased. If the present case were to go to trial the court would be obliged to get the facts regarding the alleged fraud from the appellants alone. It has been frequently emphasized by the courts that, after the great lapse of time and the death of important witnesses, it is easy for plaintiffs to charge fraud and almost impossible for defendants to meet the charges. Considering that every presumption is in favor of fair dealing, we submit, it must be obvious that appellees would be seriously prejudiced in undertaking to refute the present charges by reason of the death of Jeanette Fensky and of Campbell.

This point is ruled by the following authorities cited in appellees' brief at page 21, and not mentioned in the opinion.

Hinchman v. Kelley, 54 Fed. 63, at p. 66 (1893) (C. C. A., 9th Cir.);

Foster v. Mansfield Co., 146 U. S. 88, at p. 100 1892);

Socrates etc. Mines v. Carr Realty Co., 130 Fed. 293, at p. 297 (C. C. A., 9th Cir., 1904).

A peculiarly apt case is Hinchman v. Kelley, *supra,* decided by this court (McKenna, Circuit Justice, and Hawley and Morrow, District Judges). There the bill was dismissed on demurrer, and the judgment of dismissal affirmed by this court. The case is succinctly stated in the syllabus:

> "An assignee of one claiming to be *cestui que trust* of the vendee named in an executory contract to convey land brought suit to establish a trust in such land 19 years after the vendor's death, and 6 years after the death of the vendee, the alleged trustee,—a period exceeding the statutory period of limitation. There was no written evidence of the trust. It did not appear that its enforcement had been requested in the lifetime of either party to the contract, or that the trust was ever admitted by the vendee's executors, and no explanation of the delay was made. Held, that there was such laches as would justify a court of equity in refusing its aid."
>
> 54 Fed. 63.

The following from the opinion, together with a quotation from Story's Eq. Juris., appearing on page 66 of the report, are directly in point:

> *"One of the particular reasons which have induced the courts to refuse to act is the difficulty of ascertaining the necessary facts to make it safe for a court of equity to exercise its judicial power, and this is especially so in a case like the one*

under consideration, when the means of resisting the trust, if unfounded, cannot be obtained on account of the death of the parties. In all cases where the complaining party has slumbered over his rights for a long period of time, with no obstacle in the way to prevent him from asserting them, until the evidence upon which such rights might be questioned and overthrown is lost, and all the original actors are dead, and their affairs left to heirs or representatives, it is deemed meet and proper that the law, in the exercise of its equitable jurisdiction, should presume it to be unjust, and refuse to allow the complainant to be heard. The peace and safety of society and the property rights of the general public demand this protection. Prevost v. Gratz, 6 Wheat. 498; McKnight v. Taylor, 1 How. 168; Jenkins v. Pye, 12 Pet. 241. A failure to exercise reasonable diligence to enforce the trust, or the omission to specifically state the impediments to an earlier prosecution of the claim or demand, is another special reason for the application of the general rule. Badger v. Badger, 2 Wall. 87; Sullivan v. Railroad Co., 94 U. S. 811; Godden v. Kimmell, 99 U. S. 211; Lansdale v. Smith, 106 U. S. 394, 1 Sup. Ct. Rep. 350."

54 Fed. 65-66.

In Foster v. Mansfield etc. R. R. Co., *supra,* the court also affirmed a judgment dismissing the bill on demurrer. The bill was to set aside a foreclosure sale of a railroad under a mortgage, on the ground of fraud and collusion, but was not filed until ten years after the sale. In holding that the delay was not sufficiently explained, the United States supreme court

calls especial attention to the death of important witnesses (see page 100). Portions of the opinion might have been written for present purposes.

> "If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights; but if he is aware of his interest, and knows that proceedings are pending the result of which may be prejudicial to such interests, he is bound to look into such proceedings so far as to see that no action is taken to his detriment. * * * The slightest effort on his part would have apprised him of the proceedings subsequent to the sale; * * * Had he asked the leave of the court to intervene for the protection of his interest, it would have undoubtedly acceded to his request. Instead of this, he permits the sale to take place, and the road to pass into the hands of a new corporation, which has operated it for ten years without objection from the bondholders or creditors of the Coldwater Company, and without question as to to its title. In the meantime many of the witnesses, including both Cass and Scott, trustees, whose alleged fraudulent betrayal of their trust constitutes the gravamen of this bill, are dead, as well as Lewis, the president, and Fish and F. V. Smith, directors of the defendant company, one of whom participated with Lewis in the meeting at which the attorneys were instructed to withdraw their defense, and all opportunity of explanation from them is lost. It is evident that the plaintiff in this suit has fallen far short of that degree of diligence which, under the most recent decisions of this court, the law exacts in condonation of this long delay." (Citing cases.)
>
> 146 U. S. 99-100.

The point is also made in the brief that laches is shown where there has been a marked increase in the value of property, which in turn will be presumed from an increase in population together with lapse of time.

Galliher v. Cadwell, 145 U. S. 368.

Referring to this point the court says:

> "It may appear to be a too strict adherence to the rules of procedure to hesitate to entertain the last named presumption, but we think such matters are matters of defense and should be established by proof upon the hearing of the case." (Opinion, p. 17.)

It is submitted that the error here consists in the failure to observe that courts take judicial notice of the United States census. An enormous increase in population in San Pedro and Los Angeles during the time elapsing between the alleged fraud and the filing of the bill must therefore be presumed. This presumption being established, it follows from the case cited that an increase in value must also be presumed, there being no averments in the bill to negative the same.

III.

It is clear on principle and authority that the exception to the rule which makes a judgment final and unassailable is concerned not with false allegations in pleadings, or fraud or perjury in the presentation of evidence, but is confined to fraud *in the conduct of the suit,—such fraud as prevents parties from pre-*

senting their case. The rule is so stated in United States v. Throckmorton, 98 U. S. 61, 65, and in Pico v. Cohn, 91 Cal. 129, 134. (See appellees' brief, pp. 34-37.) After giving instances of the application of the rule, Beatty, C. J., said:

> "In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial."
>
> Pico v. Cohn, *supra.*

In a passage from the opinion of Chief Justice Shaw in Greene v. Greene, 2 Gray 361, quoted by Mr. Justice Miller in United States v. Throckmorton, *supra,* it is said:

> "But where the same matter has been either actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be controverted."
>
> 2 Gray 366.

The bill is entirely wanting in averments that either Jeanette Fensky or Campbell, or any of the appellees, resorted to any trick, or artifice, or device, to prevent the complainants from appearing in the probate proceedings; and it affirmatively appears from the allegations of the bill that they had notice and watched the progress of the proceedings [Tr. p. 27]. It is not alleged, moreover, that any notices required by law were not given; nor is there any allegation that any representations of any sort were made to appellants to induce them to refrain from appearing in the probate proceedings. All there is to this case in this

respect is that evidence was concealed showing that Jeanette Fensky's deeds had not been delivered, that unfounded representations were made to the court that the brother and sisters of Jeanette Fensky were entitled to succeed to her estate, when in truth the brother and sisters of Ferdinand Fensky were entitled to such succession. In other words, all supposed fraudulent acts on the part of appellees, or any of them, from the death of Jeanette Fensky to the present, as disclosed by the bill, consisted merely of matters which were intrinsic, and related to the very questions which were adjudicated in the probate proceedings.

It has been truthfully said of the statutory provisions governing the probate of estates in California that "It is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth." (Case of Broderick's Will, 21 Wall. 503, 517.) And it is established by numerous decisions of the supreme court of California that:

> "The distribution of the estate of a deceased person is a proceeding *in rem,* and every person who may assert any right or interest therein is required to present his claim to the court for its distribution, and the action of the court in making the determination binds the whole world, and is equally conclusive upon every claimant, whether his claim is presented, or whether he fails to appear, subject only to be reversed, set aside, or modified upon appeal, and its decree can not be

collaterally attacked for any error committed therein."

William Hill Co. v. Lawler, 116 Cal. 359;
Crew v. Pratt, 119 Cal. 139, 149.

The subject-matter upon which the court was called to act in the settlement of the final account of the administrator and distribution of the estate of Jeanette Fensky was (she having died intestate) who was entitled to distribution thereof; and the probate court was required to determine this question and to "name the persons and the portions or parts to which each shall be entitled."

C. C. P., sec. 1666;
Crew v. Pratt, 119 Cal. 139, 151.

This was the question in issue and determined. False statements and false representations to the court as to who was entitled to so succeed, and false evidence or concealment of evidence were, let it be reiterated, intrinsic, and not extrinsic, to the matters determined. Fraud, if fraud it was, was fraud practiced on the court, and not on the appellees. It is so well settled as scarcely to require the further citation of authority that unfounded allegations in pleadings or petitions, and the presentation of forged instruments or perjured testimony are *intrinsic,* and not *extrinsic* frauds. In United States v. Throckmorton, after reviewing many cases, the court succinctly stated the rule thus:

"In all these cases, and many others which have been examined, relief has been granted on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or

decree, that party has been prevented from presenting all of his case to the court."

98 U. S. 66.

Speaking of other cases the court further said:

"We think these decisions establish the doctrine on which we decide the present case, namely: that the acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, *extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.*"

98 U. S. 68.

Applying these principles the court concluded:

"The genuineness and validity of the concession from Micheltorena produced by complainant was the single question pending before the board of commissioners and the district court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document."

98 U. S. 69.

Pico v. Cohn, 91 Cal. 129, holds directly that a judgment cannot be vacated on the ground that it was obtained by perjured testimony.

The California supreme court has held that a complaint in an action to annul an order setting apart a homestead to the widow of a deceased person out of his estate, which *alleged* that the property set apart was the *separate* property of the deceased, and that the widow, defendant in the action, *knowing* that fact, *and for the purpose of deceiving the court, falsely alleged* and *falsely swore* that the property was the *community* property, whereby the court was misled and deceived, and induced to make the order, did not state facts sufficient to constitute a cause of action. (Fealey v. Fealey, 104 Cal. 354.) The opinion was written by the late Judge DeHaven, who said:

> "The case made by the complaint here falls exactly within the rule declared in United States v. Throckmorton, 98 U. S. 61; Griffith's Estate, 84 Cal. 113, and Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159."
>
> 104 Cal. 359.

And, speaking of United States v. Throckmorton and Pico v. Cohn, the learned justice continued:

> "These case are, we think, conclusive of the one now before us. So far as concerns the question here presented, there is no difference in principle in the nature of the judgments under review in the above-cited cases and the order here sought to be annulled. The order setting apart the homestead to defendant (no homestead having been declared during the lifetime of the deceased) op-

erated to vest in the defendant a title to the land so set apart. (Estate of Boland, 43 Cal. 640; Estate of Moore, 96 Cal. 522); and such order was in the nature of a judgment *in rem* (Kearney v. Kearney, 72 Cal. 591); and the court, having jurisdiction to pronounce it, it is conclusive upon plaintiff and all persons interested in the estate, and can only be successfully attacked in equity upon the same grounds upon which a judgment *in personam* may be annulled."

104 Cal. 360.

See, also,

Miller v. Perris Irr. Dist., 85 Fed. 693, 701.

It is submitted that the court again was led to an erroneous conclusion by relying on the decision of the supreme court of Kansas in Pickens v. Campbell; and, particularly, in failing to note (a) that the attack was there held to be a direct attack on the order settling Campbell's account, and (b) that the principal ground of attack there was that the settlement of Campbell's accounts was procured by the use of releases of these complainants of all demands against the Ferdinand Fensky estate which had been obtained by intentionally false statements, particularly by the representation that the Kansas real estate had not been sold by Fensky, in which case the entire title would, of course, have vested in his widow upon his death. The court expressly said that a fraud so accomplished was to be regarded as extrinsic to the issue determined by the probate court, and, therefore, capable of forming a basis for setting aside its order. (159 Pac. 22.) And that this is the basis for the ruling of the court is manifest. Re-

ferring to the opinion of the district judge in this case the Kansas court said: "The allegations in the two cases may not have been precisely the same. Here it would appear that the use of the releases, together with the receipt of the widow and domiciliary administratrix, made it unnecessary to make any decision concerning the disposal of the assets with which the ancillary administrator was chargeable." (159 Pac. 23.)

But there is no pretense that the deeds and releases executed by the complainants were used, or had anything to do with, the distribution of the estate of Jeanette Fensky; and the holding of the Kansas supreme court, therefore, is not persuasive here.

A re-reading of the opinion in Griffith v. Godey, 113 U. S. 89, will, we are confident, convince the court that it is inapplicable to any question involved in this case. In that case the defendants were held as trustees as to the proceeds arising from the sale of the property which Godey, as administrator of the estate of the brother and surviving partner of complainant, had appropriated, and which property and its proceeds he had fraudulently omitted from the administration proceedings. No question of intrinsic or extrinsic fraud which would avoid a judgment or order settling an account was considered or passed on. In Lataillade v. Orena, 91 Cal. 565, there was also a fiduciary relation and a resulting trust, and the question of extrinsic fraud was not considered, as it was not involved.

Wherefore, for the reasons here urged, appellees Eugene Wellke, Alma J. Schmidt, Amanda Katzung, Minnie S. Farnsworth, and Corrine Loveland respect-

fully pray that the decision of this court reversing the judgment of the district court be set aside and they be granted a rehearing.

Wm. J. Hunsaker,
E. W. Britt,
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Joseph L. Lewinsohn,
J. H. Merriam,
Attorneys for Said Appellees.

The undersigned, counsel for said appellees, hereby certify that in their judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

Wm. J. Hunsaker,
E. W. Britt,
Joseph L. Lewinsohn,
Of Counsel for Petitioners.